

**United States Department of Labor
Employees' Compensation Appeals Board**

G.S., claiming as widow of C.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 18-1142
Issued: July 2, 2019**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2018 appellant, through counsel, filed a timely appeal from a March 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish permanent impairment of the employee's bilateral lower extremities, warranting a schedule award; and

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

(2) whether appellant has met her burden of proof to establish permanent impairment of the employee's left upper extremity, warranting a schedule award.

FACTUAL HISTORY

On September 16, 1997 the employee, then a 53-year-old regular rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on September 10, 1997, he injured his left shoulder, upper back, and lower back when he was involved in a motor vehicle accident while in the performance of duty. He subsequently worked modified duty.

OWCP accepted the employee's claim for trapezius strain of the left shoulder, cervical strain, lumbar strain, and L5-S1 herniation.

The employee subsequently underwent the following surgical procedures: bilateral L5-S1 decompression and microscopic discectomy on March 17, 1998; lumbar fusion surgery at L4-5 and L5-S1; T10 and T11 laminectomy on August 19, 2008; and L3-4 bilateral decompressive laminectomy, lateral mass fusion, and a right L5-S1 hemilaminectomy and foraminotomy on February 22, 2010.

On July 31, 2004 the employee stopped work because the employing establishment could no longer accommodate his work restrictions. OWCP paid him wage-loss compensation on the periodic rolls effective August 8, 2004.

The employee retired from federal service effective June 30, 2011.

On September 27, 2016 the employee filed a claim for a schedule award (Form CA-7).

In a letter dated October 3, 2016, the employee, through counsel, requested that OWCP arrange an impairment rating examination for the employee because he was unable to travel and had difficulty finding a doctor who would perform an impairment rating examination.

In an October 12, 2016 examination note, Dr. Farrukh Sair, Board-certified in pain medicine and anesthesiology, related the employee's complaints of chronic low back and neck pain. He reviewed the employee's history, including his previous surgical procedures. Upon physical examination of the employee's extremities, Dr. Sair observed normal movement of all extremities with no bony abnormalities and no edema. Examination of the employee's lumbar spine demonstrated no paravertebral muscular tenderness and decreased extension. Dr. Sair reported that examination of the employee's hips showed tenderness of the bilateral sacroiliac (SI) joints. He diagnosed lumbar post-laminectomy syndrome, low back pain, enthesopathy of the hip region, and cervical spondylosis. The employee continued to receive medical treatment for his complaints of chronic low back pain secondary to lumbar post-laminectomy pain syndrome and neck pain secondary to cervical spinal stenosis and submitted examination notes. None of the reports contained an impairment rating for purposes of a schedule award.

OWCP referred the employee, along with a statement of accepted facts and the medical record to Dr. Seth Jaffe, a Board-certified orthopedist, for a second opinion examination in order to determine whether he had sustained a ratable permanent impairment due to his accepted September 10, 1997 employment injury in accordance with the sixth edition of the American

Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*).

In an April 11, 2017 report, Dr. Jaffe related that the employee had sustained a work-related injury on September 10, 1997 and noted that his claim had been accepted for trapezius strain of the left shoulder, cervical strain, lumbar strain, and herniation of the lumbar disc at L5-S1. Upon examination of the employee's lumbar spine, he observed tenderness with range of motion in the paraspinal muscles and in the bilateral sacroiliac joints. Examination of the employee's bilateral lower extremities demonstrated motor strength of 5/5 and intact to light touch sensation. Dr. Jaffe indicated that the neurological examination showed difficulty with heel and toe walking and decreased sensation in the feet. Examination of the employee's left shoulder showed tenderness with range of motion, both over the deltoid and over the acromioclavicular (AC) joint. Sensation was intact to light touch and muscle strength was 4/5. Dr. Jaffe diagnosed post-laminectomy syndrome and lumbago with sciatica on the left side.

Regarding the employee's work-related injuries, Dr. Jaffe opined that his accepted left shoulder and lumbar strains had resolved. He related that, according to the medical records, the employee had reached maximum medical improvement (MMI) "[sometime] in 2005." Dr. Jaffe reported that, according to "[T]able 17" of the sixth edition of the A.M.A., *Guides*, the lumbar spine regional grid, the employee was a class 3. He assigned grade modifiers of 3 for functional history, 3 for physical examination, and 3 for clinical studies. Dr. Jaffe concluded that the employee had a final permanent impairment rating of 19 percent to the lumbar spine.

Addendum notes were included at the conclusion of Dr. Jaffe's report. In a May 3, 2017 note, Dr. Jaffe related that, according to the *The Guides Newsletter*, the employee had 16 percent permanent impairment of the lower extremities due to moderate sensory deficits at L4, L5, and S1. He explained that some of the employee's other apportionment previously awarded were for other deficits related to the spine and motor function non-nerve related. In a May 23, 2017 addendum note, Dr. Jaffe reported that the apportionment of the employee's 16 percent permanent impairment rating of the lower extremities was 6 percent for L4, 6 percent for L5, and 4 percent for S1 nerve roots for a total of 16 percent permanent impairment.

In a May 30, 2017 letter, the employee's spouse informed OWCP that the employee had died on May 8, 2017.

Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the employee's claim, including Dr. Jaffe's permanent impairment rating. In a June 20, 2017 report, he noted that the employee's claim had been accepted for trapezius strain of the left shoulder, cervical strain, lumbar strain, and L5-S1 disc herniation. Dr. Fellars related that the employee had documented 5/5 strength in his lower extremities and normal sensation with nonfocal neurologic examination with respect to the spine. He further reported that examination of the employee's left shoulder showed pain with range of motion and tenderness over the deltoid and AC joint. Muscle strength was 4/5. Dr. Fellars opined that, according to *The Guides Newsletter*, proposed Table 2, the employee had zero percent lower

³ A.M.A., *Guides* (6th ed. 2009).

extremity permanent impairment. He explained that, although the employee may have significant pain, based on the documentation, the employee had no sensory or motor disturbances to establish a lower extremity impairment according to *The Guides Newsletter*. Dr. Fellars noted his disagreement with Dr. Jaffe's impairment rating as Dr. Jaffe documented that the employee had 5/5 strength and normal sensory examination, but also reported changes in sensation at L4, L5, and S1. He reported that the employee had reached MMI on April 11, 2017.

By letter dated June 28, 2017, OWCP requested that Dr. Jaffe review Dr. Fellars' June 20, 2017 report and provide clarification on whether the employee had work-related lower extremity permanent impairment due to his accepted lumbar injury.

In a June 30, 2017 addendum report, Dr. Jaffe noted his disagreement with Dr. Fellars' permanent impairment rating based on the fact that the employee had no sensory deficits on examination. He explained that he did not just take into account the examination, but also diagnostic studies. Dr. Jaffe indicated that the employee had an abnormal electromyography (EMG) in 2009, abnormal x-rays, and abnormal scans. He reported that he continued to opine the same as in his addendum notes from May 2017.

Dr. Fellars reviewed Dr. Jaffe's June 30, 2017 addendum report and, in a July 18, 2017 report, noted that Dr. Jaffe's reports contained contradictory statements. He indicated that on page three of his report, Dr. Jaffe had documented normal strength and sensation as part of the employee's lumbar examination, but he later reported there was obvious impairment. Dr. Fellars explained that per *The Guides Newsletter*, impairment is assigned based on examination, not the imaging studies. He opined that because the employee's examination revealed normal strength and sensation, the employee had zero percent permanent impairment of each lower extremity due to his accepted lumbar injury.

By decision dated July 20, 2017, OWCP denied the employee's claim for a schedule award. It found that the medical evidence of record failed to establish permanent impairment to his lower extremities as a result of his accepted lumbar injury. OWCP determined that the weight of medical evidence rested with Dr. Fellars, as the DMA, who found in his June 20 and July 18, 2017 reports, that appellant had zero percent permanent impairment according to *The Guides Newsletter*.

On August 2, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 13, 2018.

By decision dated March 26, 2018, an OWCP hearing representative affirmed the July 20, 2017 schedule award decision.

LEGAL PRECEDENT -- ISSUES 1 & 2

The schedule award provisions of FECA⁴ and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not

⁴ 5 U.S.C. § 8107.

specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁵ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁶

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.⁷

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied for rating spinal nerve impairments consistent with sixth edition methodology.¹⁰ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹¹ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the employee's bilateral lower extremities, warranting a schedule award.

⁵ 20 C.F.R. § 10.404; *see also* *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *Id.* at Chapter 2.808.6; *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

⁸ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁰ *See G.N.*, Docket No. 10-0850 (issued November 12, 2010); *supra* note 6 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

¹² *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

In reports dated June 20 and July 18, 2017, Dr. Fellars, serving as the DMA, noted inconsistencies with Dr. Jaffe's April 11, 2017 second opinion impairment rating as he documented that the employee had 5/5 strength and normal sensory examination, but also reported changes in sensation at L4, L5, and S1. He explained that, although the employee may have had significant pain, the record revealed that he had no sensory or motor disturbances on examination to establish lower extremity permanent impairment according to proposed Table 2 of *The Guides Newsletter*. Thus, Dr. Fellars concluded that the employee had zero percent lower extremity permanent impairment. He reported that the employee had reached MMI on April 11, 2017.

The Board has carefully reviewed the opinion of Dr. Fellars and finds that his June 20 and July 18, 2017 reports were sufficiently rationalized to establish that the employee had zero percent lower extremity permanent impairment due to his accepted lumbar injury. Dr. Fellars' opinion was based on a proper factual and medical history, which he reviewed, was based on an accurate application of the A.M.A., *Guides* and *The Guides Newsletter*, and provided medical rationale for his impairment rating. The Board finds that OWCP properly relied on the reports of Dr. Fellars to find that the employee did not sustain permanent impairment of his bilateral lower extremities due to his accepted lumbar injury.¹³ Appellant has not provided a rationalized medical opinion to dispute Dr. Fellars' impairment rating or create a conflict in medical opinion regarding whether the employee has permanent impairment of his bilateral lower extremities due to his accepted lumbar injury.¹⁴ As the medical evidence of record was insufficient to establish permanent impairment of the employee's bilateral lower extremities, appellant has not met her burden of proof to establish a schedule award claim.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision regarding whether appellant has met her burden of proof to establish permanent impairment of the employee's left upper extremity causally related to his accepted September 10, 1997 employment injury.

As explained above, Dr. Fellars opined in his June 20 and July 18, 2017 reports that the employee had no permanent impairment of his bilateral upper extremities due to his accepted September 10, 1997 lumbar injury. The Board, however, notes that while OWCP referred the employee's schedule award claim to Dr. Fellars and requested an impairment rating based on the employee's accepted lumbar conditions, it failed to ask him to address whether he sustained permanent impairment due to his accepted left shoulder trapezius strain condition, for which he also requested a schedule award. As counsel pointed out in the February 13, 2018 telephonic hearing, Dr. Fellars had not mentioned this additional work-related left shoulder condition, nor did

¹³ See *D.B.*, Docket No. 17-0930 (issued July 11, 2018).

¹⁴ When the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by the medical adviser. See *P.B.*, Docket No. 17-1046 (issued January 2, 2018).

he provide an opinion on whether he sustained permanent impairment to his left upper extremity as a result of the September 10, 1997 employment injury.¹⁵ The Board notes that Dr. Fellars noted that examination of the employee's left shoulder showed pain with range of motion, tenderness over the deltoid and AC joint, and 4/5 muscle strength testing. Dr. Fellars failed to address these examination findings even though the sixth edition of the A.M.A., *Guides* provides for permanent impairment of the upper extremity due to left shoulder symptoms, such as shoulder pain and shoulder strain.¹⁶

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁷ While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that justice is done.¹⁸ As OWCP did not request that Dr. Fellars address whether the employee had permanent impairment of his left upper extremity causally related to his September 10, 1997 employment injury, his report is insufficient to resolve the pertinent schedule award issue in this case. The Board, therefore, finds that the case must be remanded to OWCP. On remand OWCP should request that Dr. Fellars provide a supplemental report in which he addresses whether the employee has permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* due to all of his accepted September 10, 1997 employment injuries. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on the employee's schedule award claim.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the employee's bilateral lower extremities, warranting a schedule award. The Board also finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish permanent impairment of the employee's left upper extremity, warranting a schedule award.

¹⁵ See *B.A.*, Docket No. 17-1360 (issued January 10, 2018); see also *C.S.*, Docket No. 16-1585 (issued August 17, 2017).

¹⁶ See A.M.A., *Guides*, Table 15-5: Shoulder Regional Grid, 401-05.

¹⁷ See *Vanessa Young*, 56 ECAB 575 (2004).

¹⁸ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further action consistent with this decision of the Board.

Issued: July 2, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board